Supreme Court, U.S.
FILED

931549 MAR 30 1994

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COUNTY OF WESTCHESTER, NEW YORK,

Petitioner,

vs.

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT; TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; CONVENT OF THE SACRED HEART; LAURELTON CONVALESCENT HOME, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARILYN J. SLAATTEN
Westchester County Attorney
600 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601
(914) 285-2673

CAROL L. VAN SCOYOC
Deputy County Attorney
Counsel of Record

MARGUERITE R. WIESS
Assistant County Attorney

QUESTION PRESENTED

1. May the court below deprive Westchester County, New York of its right, pursuant to 28 U.S.C. §1332, to have its claims against Connecticut residents (which affect the National Airport System plan adopted by the Federal Aviation Administration) determined in a neutral and impartial federal court, by giving effect to a Connecticut state court opinion rendered after certification of questions of law, where the state opinion expressly refused to answer the certified questions of law, but purported, instead, to decide the ultimate question of fact in a manner diametrically opposed to the finding of the United States District Court?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

TABLE OF CONTENTS OF BRIEF

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CONTENTS OF APPENDIX	v
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	2
JURISDICTION	5
STATUTES AND RULES INVOLVED	8
STATEMENT OF THE CASE	11
A. Background	11
B. Statement of Facts	15
C. Prior Proceedings	18
REASONS FOR GRANTING THE WRIT	24
CONCLUSION	45

TABLE OF CONTENTS OF APPENDIX

Page

Appendix A -

Decision of the United States Court of Appeals for the Second Circuit, Dated November 10, 1993 with Order and Mandate A-1

Appendix B -

Opinion and Order of the United States District Court for the Southern District of New York, Dated June 2, 1992 ..... A-28

Appendix C -

Order and Certificate of the United States Court of Appeals for the Second Circuit, Dated January 6, 1993 ..... A-158

Appendix D -

Opinion of the Connecticut Supreme Court, Dated July 28, 1993 ..... A-172

Appendix E -

Order of the United States Court of Appeals for the Second Circuit, Dated December 30, 1993 . A-194

TABLE OF AUTHORITIES

Cases	Page
Alexander & Alexander Services, Inc. v. Lloyd's Syndicate 317, 902 F.2d 165 (2d Cir. 1990)	30n.
Andrzejczyk v. Advo System, Inc., 146 Conn. 428, 151 A.2d 881 (1959)	18, 32
Bank of America National Trust and Savings Association v. Parnell, 352 U.S. 29, 77 S. Ct. 119 (1956)	43-44
Banque Worms v. Bankamerica Intern., 928 F.2d 538 (2d Cir. 1991)	30n.
Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S. Ct. 573 (1943)	42
County of Westchester v. Town of Greenwich, 745 F. Supp. 951 (S.D.N.Y. 1990)	19n., 29
County of Westchester v. Town of Greenwich, 793 F. Supp. 1195 (S.D.N.Y. 1992)	2, 3, 18
County of Westchester, New York v. Commissioner of Transportation of the State of Connecticut, 986 F.2d 624 (2d Cir. 1993)	3, 20
County of Westchester, New York v. Town of Greenwich, 227 Conn. 495, 629 A.2d 1084 (1993)	3, 4
County of Westchester, New York v. Commissioner of Transportation of the State of Connecticut, 9 F. 3d 242 (2d Cir. 1993)	4
DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987)	30n.

Cases	Page
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938)	28, 42
Griggs v. County of Allegheny, Pa., 369 U.S. 84, 82 S. Ct. 531 (1962) *reh'g denied*, 369 U.S. 857 (1962)	35n., 37
Home Ins. Co. v. American Home Products Corp., 873 F.2d 520 (2d Cir. 1989)	30n.
Kidney by Kidney v. Kolmar, 808 F.2d 955 (2d Cir. 1986)	10, 30n.
Klar Krest Realty, Inc. v. Rajon Realty Corp., 190 Conn. 163, 459 A.2d 1021 (1983)	18, 32
Lehman Brothers v. Schein, 416 U.S. 386, 94 S.Ct. 1741 (1974)	19n.
Miree v. De Kalb County, Ga., 433 U.S. 25, 97 S. Ct. 2490 (1977)	42
Page Motor Co. v. Baker, 182 Conn. 484, 438 A.2d 739 (1980)	37n.
Peterson v. Oxford, 189 Conn. 740, 459 A.2d 100 (1983)	37n.
Town of Rye v. Skinner, 907 F.2d 23 (2d Cir. 1990) *cert. denied*, 498 U.S. 1024, 111 S.Ct. 673 (1991)	29n.
United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062 (1946)	37
United States v. County of Westchester, 571 F. Supp. 786 (S.D.N.Y. 1983)	13

	Page
STATUTES	
United States Constitution, Article III, §2	27
28 U.S.C. §1332	8, 27, 36
28 U.S.C. §1291(b)	5, 18
28 U.S.C. §1254(1)	7
49 U.S.C. §§171-184	12
49 App. U.S.C. §1301(29)	26
49 U.S.C. §1302	12
49 U.S.C. §1303	12
49 App. U.S.C. § 1304	12, 26
Public Law 85-726	12
Public Law 91-255	12, 14
Connecticut General Statutes	
Section 15-34(8)	33
Section 15-73	33
Section 51-199a	8, 9
RULES AND REGULATIONS	
Rules of the Supreme Court of the United States, Rule §13.1	7
Rules of the United States Court of Appeals for the Second Circuit, Rule §0.27	9, 10
14 C.F.R. §77.25	14, 16
14 C.F.R. §139.101	14
PERIODICALS	
Hamilton, Alexander *Federalist Papers*, No. 80	27

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

COUNTY OF WESTCHESTER, NEW YORK,

Petitioner,

VS.

COMMISSIONER OF TRANSPORTATION OF THE STATE OF CONNECTICUT; TOWN OF GREENWICH; LAURELTON NURSING HOME, INC.; GREENWICH KING STREET ASSOCIATES II, L.P.; MILDRED TOMONTO; CONVENT OF THE SACRED HEART; LAURELTON CONVALESCENT HOME, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the County of Westchester, New York, respectfully

petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, reversing the Opinion and Order of the United States District Court for the Southern District of New York granting petitioner a prescriptive avigation easement over lands in Connecticut belonging to the respondents.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York, granting petitioner a prescriptive avigation easement over respondents' properties in Connecticut, reported as County of Westchester v. Town of Greenwich, Connecticut, Commissioner of Transportation of the State of Connecticut, Laurelton Nursing Home, Inc., Greenwich King Street Associates II, L.P., the Convent of the

Sacred Heart and Mildred Tomonto, appears in Appendix B hereto at A28, and is reported at 793 F.Supp. 1195 (S.D.N.Y. 1992).

The decision of the United States Court of Appeals for the Second Circuit certifying questions of law to the Connecticut Supreme Court appears in Appendix C hereto at A158, and is reported as County of Westchester, New York v. Commissioner of Transportation of the State of Connecticut, Town of Greenwich; Laurelton Nursing Home, Inc.; Greenwich King Street Associates II, L.P.; Mildred Tomonto; the Convent of the Sacred Heart, Laurel Convalescent Home, Inc. at 986 F.2d 624 (2d Cir. 1993).

The decision of the Connecticut Supreme Court, County of Westchester, New York v. Town of Greenwich at al., is

officially reported at 227 Conn. 495 (1993) and appears in Appendix D hereto at A172.

The Decision and Order of the United States Court of Appeals for the Second Circuit reversing the Order of the United States District Court for the Southern District of New York appears in Appendix A hereto at A1 and is reported at 9 F.3d 242 (2d Cir. 1993).

The Order of the United States Court of Appeals for the Second Circuit denying Westchester County's petition for rehearing with a suggestion for rehearing in banc, which is not reported, appears in Appendix E hereto at A194.

JURISDICTION

The decision and order of the United States District Court for the Southern District of New York was entered on June 3, 1992. Notices of Appeal from said Order were filed by the Town of Greenwich, Mildred Tomonto, Laurelton Nursing Home, Laurel Convalescent Home, Inc., Greenwich King Street Associates II, L.P. and the Convent of the Sacred Heart on June 29 and July 1 and July 2, 1992. On August 24, 1992, the United States District Court for the Southern District of New York amended its Order of June 2, 1992 to include a certification pursuant to 28 U.S.C. §1292(b) that an interlocutory appeal should be entertained. By an Order filed on January 6, 1993, the United States Court of Appeals for the Second Circuit ordered the Clerk of the Court

to transmit to the Connecticut Supreme Court a certification of three questions of law to be decided by that court. The Connecticut Supreme Court released its decision on July 28, 1993. On November 10, 1993, the United States Court of Appeals for the Second Circuit, based upon the Connecticut Supreme Court's decision, reversed the District Court's grant of partial summary judgment in favor of the County of Westchester and directed that court to enter judgment for the defendants and remanded for further proceedings on a separate cause of action. On November 24, 1993, the County of Westchester petitioned the United States Court of Appeals for the Second Circuit for rehearing with a suggestion for a rehearing in banc. By an Order filed on December 30, 1993, the United States Court of Appeals for the

Second Circuit denied the petition for rehearing.

In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of the denial of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. §1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and is between

(1) Citizens of different States;...

Connecticut General Statutes, Section 51-199a.

Uniform Certification of Questions of Law Act. (a) This section may be cited as the Uniform Certification of Questions of Law Act.

(b) The supreme court may answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States or a United States district court when

requested by the certifying court if there are involved in any proceedings before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state. (P.A. 85-111).

Rule §0.27 of the United States Court of Appeals for the Second Circuit Certification of Questions of State Law

Where authorized by state law, the Court may certify to the highest Court of a State an unsettled and significant question of state law that will control the outcome of a case pending before this Court. Such certification may be made by this Court sua sponte or on motion of a party filed with the clerk of this Court. Certification will be in

accordance with the procedures provided by the state's legislature or highest state court rules, e.g., Conn. Public Act No. 85-111; New York Court of Appeals Rule 500.7. Certification may stay the proceedings in this court pending the state court's decision whether to accept the certification and its decision of the certified questions.

(Eff. Nov. 10, 1986.) See also Kidney by Kidney v. Kolmar, Laboratories, Inc., 808 F.2d 955 (2d Cir. 1987).

STATEMENT OF THE CASE

A. Background

The Federal Aviation Administration (FAA) substantially reduced the usable length of Runway 11/29 at the Westchester County Airport (Airport)* because trees on respondents' properties had grown to such height that they posed a potential hazard to planes attempting to land. Inasmuch as the airport is in New York, and the trees are in Connecticut, making condemnation proceedings unavailable, the County of Westchester (County) commenced an action in the United States District Court for the Southern District of New York to establish an avigation easement, (including a clearance easement), over the airspace needed by aircraft to land safely on Runway 11/29.

*The airport has only two runways.

Congress has taken an active interest in, and exercised a vital role in the development of the country's air transportation system since the enactment of the Air Commerce Act of 1926 (49 U.S.C. §§171-184). The Federal Aviation Act of 1958 (P.L. 85-726) declared that "the promotion of safety in air commerce and the promotion, encouragement and development of civil aviation" were in the public interest (49 U.S.C. §§1302, 1303) and that every citizen of the United States was entitled to freedom of transit through the navigable airspace of the United States (49 U.S.C. §1304).

Pursuant to the Airport and Airway Development Act of 1970 (P.L. 91-258), the FAA prepared a national airport system plan. The Westchester County Airport is included in the national

system and is an integral part of the New York City Metropolitan Area Airport System, accounting for approximately 15% of total operations in the metropolitan area (LaGuardia, JFK, Newark, Teterboro and Westchester). For a description of the National Airport System and Westchester County's part therein, see United States v. County of Westchester, 571 F.Supp. 786, 788-790 (S.D.N.Y. 1983) in which the United States District Court for the Southern District of New York found that a midnight to 7:00 a.m. curfew at the Westchester County Airport "has an adverse impact on the flow of interstate air commerce" and "also adversely affects the operation of the air transportation system in the New York metropolitan area." Id. 797. A fortiori, substantial shortening of one runway to 3100 feet, to say nothing of

its ultimate closure should the trees continue to grow unimpeded, will severely disrupt the operation of the air transportation system in the New York metropolitan area.

In furtherance of the development of a national transportation policy and the enhancement of air safety, Congress amended the Federal Aviation Act of 1958 (P.L. 91-258) to give the FAA power to certify airports and to make it unlawful to operate airports without a certificate. Among the many rules and regulations adopted pursuant to this authority, were those set forth in 14 C.F.R. (Code of Federal Regulations) §77.25 and §139.101 requiring that the approach surfaces at the end of runways be kept free of all obstructions and that buffer zones of empty airspace (clear zones) be maintained around landing glide slopes

-- those areas through which aircraft descend to reach the runway.

B. Facts

The Westchester County Airport was constructed by the United States of America* in 1942 for use in the war effort, and turned over to the County in 1945 at the end of World War II. The airport and Runway 11/29 (the obstruction of whose approach surfaces give rise to the present litigation) have been in continual and constant use for over fifty years. Runway 11/29 is sandwiched in between Rye Lake and Interstate Highway 684 on its western end and the Connecticut border on its eastern end.**

---

* by the Civil Aeronautics Administration with the assistance of the Army Corps of Engineers.

**The eastern end of Runway 11/29 is barely 300 feet from the state line between New York and Connecticut.

Over the years, trees on respondents' properties grew to the point where they penetrated the airspace at the end of Runway 11/29 to such an extent that they posed a potential hazard to aircraft landing on that runway, causing the FAA, pursuant to its safety regulations (14 CFR §77.25) to displace the landing threshold of the runway by 1300 feet, reducing its usable length by approximately one third and rendering it unusable to all but very light aircraft.

When the United States government constructed the airport in 1942, it neglected to condemn any property in Connecticut or to negotiate any avigation or clearance easements over property lying beneath the flight paths used by aircraft landing on Runway 11/29 from the east. Once the airport was turned over to the County by the United

States, the opportunity for condemnation expired because a New York municipal corporation lacks authority to condemn property in Connecticut. Attempts by the County to negotiate easements for tree trimming with the Connecticut property owners has proved unavailing.*

Faced with the failure of the United States to acquire sufficient property at the time of construction to ensure future operations, and its own inability to institute condemnation proceedings, the County commenced an action, based upon diversity jurisdiction, in the United States District Court for the Southern District of New York to secure a prescriptive avigation easement over respondents' Connecticut properties,

---

*Respondents have even refused permission to install safety devices, e.g. the Visual Approach Slope Indicator (VASI) on their property.

based upon its fifty-year use of such airspace that was "open, visible, continuous and uninterrupted for fifteen years and made under a claim of right" as required by the Connecticut law of prescriptive easements. Andrzejczyk v. Advo Systems, Inc., 146 Conn. 428, 431, 151 A.2d 881 (1959); Klar Krest Realty, Inc. v. Rajon Realty Corp., 190 Conn. 163, 168 459 A.2d 1021, 1024-5 (1983).

C. Prior Proceedings

In County of Westchester v. Town of Greenwich, 793 F.Supp. 1195 (S.D.N.Y. 1992) set forth in Appendix B at A28, the District Court (GOETTEL, J.), after a scrupulous examination of the facts and law, granted the County a prescriptive avigation easement over respondents' lands. Pursuant to 28 U.S.C. §1292(b), the United States Court of Appeals accepted respondents'

interlocutory appeals.

Thereafter, the Connecticut Attorney General in an Amicus Curiae brief requested, for the first time,* that the Court of Appeals certify questions of law pertaining to prescriptive avigation easements to the Connecticut Supreme Court.

The Court of Appeals, despite the parties' reluctance, certified the following three questions of law to the Connecticut Supreme Court:

1. Can an avigation easement be acquired by prescription in the

*The Connecticut Attorney General, as the attorney for the State Commissioner of Transportation, had been involved in the litigation since its inception in 1990. See County of Westchester v. Town of Greenwich, 745 F.Supp. 951 (S.D.N.Y. 1990). Cf. Chief Justice Rehnquist's comments with respect to tardy requests for Certification in Lehman Brothers v. Schein, 416 U.S. 386, 392-395, 94 S.Ct. 1741, 1745-47 (1974).

State of Connecticut?

2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut?

3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include whatever airspace is necessary to use the easement?*

The Connecticut Supreme Court in its opinion County of Westchester, New York v. Town of Greenwich, 227 Conn. 495, 629 A.2d 1084 (1993) set forth in Appendix D at A172, explicitly refrained from answering any of the questions of law

*The Court of Appeals' Order and Certification are set forth in Appendix C at A158.

certified to it, and, instead, made the ultimate finding of fact that "under the circumstances of this case", the County had not acquired a prescriptive avigation easement.

The County moved the Court of Appeals to reject the Connecticut Supreme Court's opinion as unresponsive on the law and in excess of its jurisdiction on the facts, and for consideration of the appeal on the basis of the papers submitted and oral argument held on November 18, 1992.

The panel, in a two judge* Per Curiam decision dated November 10, 1993, (set forth in Appendix A at A1) denied the County's motion and reversed the District Court's Order, and remanded the

---

*The Honorable Robert F.Peckham, Senior United States District Judge for the Northern District of California, sitting as a member of the panel by designation, died on February 16, 1993.

case for further proceedings based upon the Connecticut Supreme Court's opinion on the facts.

The County thereafter petitioned the Court of Appeals for a rehearing with a suggestion for a rehearing in banc on the grounds that the certification of questions of law to the state court was erroneous and not in conformity with the Court of Appeals' own practice; that the state court opinion was inconsistent, unresponsive on the law and in excess of its jurisdiction on the facts; and that the Court of Appeals by allowing the state court to make the ultimate finding of fact, deprived the County of Westchester of its right to avail itself of the diversity jurisdiction of the federal court for a fair and impartial determination of its claims against Connecticut residents.

This petition was denied on December 30, 1993. A Copy of the Court of Appeals Order is set forth in Appendix E at A194.

REASONS FOR GRANTING THE WRIT

Trees growing in Connecticut in proximity to the end of Runway 11/29 at the Westchester County Airport have obstructed the airspace needed to insure safety in landing on Runway 11/29 to such an extent that the Federal Aviation Administration has displaced the landing threshold, thereby drastically shortening the usable length of the runway. If these trees are not trimmed, but are allowed to grow without interruption, operations at the Westchester County Airport will be severely curtailed which, in turn, will affect the national air transportation system for the New York Metropolitan Region.

The United States government, which built the airport in 1942, did not condemn land in Connecticut to enable it, as the owner and operator of the

airport, to trim the trees as necessary. Westchester County which took over the airport from the United States at the end of World War II, is, as a matter of law, unable to condemn property in Connecticut. In order to keep Runway 11/29 open and the airport operating as an integral part of the national airport system plan, Westchester County commenced an action in federal court to impose a prescriptive avigation easement over the airspace in Connecticut needed to allow aircraft to land safely. The choice of federal court was deliberate. Not only did Westchester County seek an impartial tribunal for the resolution of its own claims, but it also sought a forum sensitive to the Congress' interest in the national air transport system.

The case raises questions of whether

out-of-state litigants espousing locally unpopular views can expect to receive a fair and impartial hearing in the federal courts, or whether they will be forced to have their claims determined in a less than receptive state court environment -- whether an unresponsive state court opinion will be allowed to subvert national aviation policy and imperil the right of all citizens to freedom of transit through the navigable airspace of the United States (49 U.S.C. §1304), including "airspace needed to insure safety in take-off and landing of aircraft" (49 U.S.C. §1301 (29)).

The Second Circuit Court of Appeals' decision in this case deprives Westchester County, New York and its citizens, of an essential right, recognized by the drafters of the Constitution and provided by Congress --

the right to have their claims decided by a fair and impartial tribunal.

As Alexander Hamilton so eloquently expressed in the Federalist Papers, No. 80:

> "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens."

Pursuant to this fundamental and quintessential principle of fair play, the Constitution of the United States, Article III, §2 provides that the judicial process of the United States extends to controversies between citizens of different states, and Congress has declared that:

> The district courts shall have original jurisdiction of all civil actions...between (1) Citizens of different States...". 28 U.S.C. §1332.

As this Court recognized in Erie R. Co. v. Tompkins, 304 U.S. 64, 67, 58 S.Ct. 817, 820 (1938), diversity jurisdiction was conferred on the federal courts not only to combat actual discrimination but "to prevent apprehended discrimination in state courts against those not citizens of the state." Notwithstanding periodic suggestions that it be eliminated, it has remained a cornerstone of federal jurisdiction because of the perception that even in these modern, sophisticated times, citizens of one state may not be able to obtain an impartial or unbiased hearing in the courts of another state. This is especially true in cases like the one at bar where the litigant, or the subject of the litigation, is one that arouses strong local passions.

Airports, despite efforts at noise abatement, are generally not beloved by those who live in proximity to them. As the District Court below found, County of Westchester v. Town of Greenwich, 745 F.Supp. 951, 953 (S.D.N.Y. 1990):

> "The property owner defendants claim they are not, and never have been, interested in having any airplanes flying overhead, and are taking advantage of the fact that the ball is in their court now that the trees have reached an intrusive level."*

It is for just such reasons that Westchester County exercised its right to invoke the jurisdiction of the federal court system.

The Court below has denied Westchester County its right to a fair and impartial forum for the resolution

---

*See also Town of Rye v. Skinner, 907 F.2d 23 (2d Cir. 1990) cert. denied, 498 U.S. 1024, 111 S.Ct. 673 (1991) in which the Town of Greenwich among others, sought to prevent the modernization of the Westchester County Airport.

of its claims, not by certifying questions of law to the Supreme Court of Connecticut (although certification in this case, which presented an issue never likely to arise again, was contrary to the Court's usual practice*) but by giving effect to the opinion of the Connecticut Supreme Court which refused to answer any of the questions of law certified to it while at the same time purporting to decide the ultimate question of fact. The Connecticut Court

---

*The questions certified should be confined to issues likely to recur with some frequency, which will have a significant impact on state law or involve the application of important public policy. Kidney by Kidney v. Kolmar, 808 F.2d 955 (2d Cir. 1987); DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987); Home Ins. Co. v. American Home Products Corp., 873 F.2d 520 (2d Cir. 1989); Alexander & Alexander Services, Inc. v. Lloyd's Syndicate 317, 902 F.2d 165 (2d Cir. 1990); Banque Worms v. Bankamerica Intern., 928 F.2d 538 (2d Cir. 1991).

refused to either rule that it was impossible to acquire an avigation easement by prescription in Connecticut, or divulge what steps were necessary to acquire such an easement prescriptively. Instead, it stated that since Westchester County was not entitled to a prescriptive avigation easement, it was unnecessary to answer the certified questions of law.

By allowing the Connecticut court to decide the ultimate question of fact, the Court of Appeals for the Second Circuit abolished diversity jurisdiction in this case and left Westchester County to the mercy of the Connecticut Court in its dispute with Connecticut residents.

The basic question of law certified by the Court below to the Connecticut Supreme Court was "Can an avigation easement be acquired by prescription in the State of Connecticut?". The

Connecticut law of prescriptive easements is firmly established. A successful claimant must show that its use was "open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." Andrzejczyk v. Advo Systems, Inc., 146 Conn. 428, 151 A.2d 881 (1959); Klar Krest Realty, Inc. v. Rajon Realty Corp., 190 Conn. 163, 459 A.2d 1021 (1983). The District Court found as a fact that Westchester County's use of Runway 11/29 was open and visible (App. infra, at A82), adverse (App. infra, at A84-86), made under a claim of right (App. infra, at A86-7) and continuous and uninterrupted for a period of fifteen years (App. infra, at A109-10), and therefore, satisfied all of the Connecticut requirements for a prescription easement. However, because

there was no Connecticut case law* with respect to prescriptive avigation easements, the Court below certified questions of law to the Connecticut Supreme Court to discover whether Connecticut required more (and if so, what requirements) than usage which was open, visible, adverse, continuous and uninterrupted for fifteen years and made under a claim of right to acquire a prescriptive avigation easement.

At the very outset of its opinion, the Connecticut Supreme Court misstated the certified question of law presented to it by declaring: "The dispositive question is whether the plaintiff ... has acquired on ... avigation easement

---

*Connecticut statutes explicitly recognize avigation easements. Connecticut General Statutes, Section 15-73 and Section 15-34(8), and Section 15-41-31(d) of the Regulations of Connecticut State Agencies.

by prescription ..." (App. infra, at A175).

The Connecticut Supreme Court concluded that the County "did not acquire a prescriptive avigation easement in the circumstances presented"* (emphasis supplied) and declined to decide "whether an avigation easement may ever be acquired by prescription." Clearly, this decision does nothing to clarify the Connecticut law of prescriptive avigation easements, and strongly implies that prescriptive avigation easements may be acquired in other unspecified circumstances.

The Connecticut court usurped the

---

*The Connecticut court repeatedly dwelt on the facts, rather then the law, e.g. "in the circumstance of this case" App. infra, at A177, "in the circumstances presented" App. infra, at A187, "in these circumstances" App. infra, at A189, "not in these circumstances" App. infra, at A193.

authority of the federal district court to make findings of fact, and made several which in effect "reversed" the findings of the district court.* The Court of Appeals by its certification sought to discover whether Connecticut law recognizes prescriptive avigation easements, and what legal requirements are necessary to obtain them. With this information, the federal court is supposed to make its own findings of fact and apply them to Connecticut law.

The Court of Appeals for the Second Circuit by reversing the District

---

*E.g., the Connecticut court found that the overflights had not interfered with the landowners' use and enjoyment of their properties (App. infra, at A191), whereas the District Court found that the overflights came within 31 feet and 17 feet respectively of Tomonto's and Greenwich King Street's properties (App. infra, at A84-85), well within the limits set by this Court for such interference in Griggs v. County of Allegheny, Pa., 369 U.S. 84, 82 S.Ct. 531 (1962) reh'g denied,369 U.S.857 (1962). Furthermore,

Court's decision based upon the Connecticut court's finding of fact, has deprived petitioner of its right pursuant to 28 U.S.C. §1332 to have the ultimate findings of fact made by a neutral tribunal.

While refusing to explain or describe the steps necessary to acquire a prescriptive avigation easement, the Connecticut court implied rather strongly that its finding of fact, negating the County's acquisition of a prescriptive avigation easement, was based upon the inability of the Connecticut landowners to enjoin aircraft from landing at the Westchester County Airport.*

---

the County's use of the clear zones as safety buffers was incompatible with respondents' desires to grow trees to their mature height (App. infra, at A86).

*Heretofore, the Connecticut Supreme Court has taken a somewhat less rigid view of property rights, holding that

Since flights through the navigable airspace of the United States may not be enjoined, United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062(1944); Griggs v. County of Allegheny, Pa., 269 U.S. 84, 82 S.Ct. 531 (1962) reh'g denied, 369 U.S. 857 (1962), it is difficult to imagine under what other circumstances the Connecticut court might ever recognize a prescriptive avigation easement.

Petitioner is not asking this Court, or the Court below to "correct" the Connecticut Supreme Court's

---

they must be exercised with reference to the rights of others.
"Current social policy dictates that a person no longer have unfettered control of his land. In an urbanized state such as Connecticut it would be unjust for [an easement owner] to ignore the harmful consequences of his actions." Page Motor Co. v. Baker, 182 Conn. 484, 438 A.2d 739 (1980) cited with approval in Peterson v. Oxford, 189 Conn. 740, 746, 459 A.2d 100, 103 (1983).

interpretation of Connecticut law. The Connecticut Court never clarified, interpreted or declared the Connecticut law of prescriptive avigation easements.

Petitioner maintains that since the Connecticut Supreme Court refused to answer the questions of law certified to it, and refused to clarify the Connecticut law of prescriptive avigation easements, the Court below erred in applying the Connecticut opinion* and also erred in reversing the District Court based upon the Connecticut court's

---

*The Court below chided petitioner for failing to cite any authority (App. infra, at A20) to support rejecting the Connecticut opinion. However, this appears to be a case of first impression. The entire purpose behind certifying questions of law is to clarify the law of the other jurisdiction. There is no statutory or case law which requires a court to accept an unresponsive opinion.

findings of fact.*

Furthermore, the Court below in commenting (App. infra, at A21) that Connecticut appeared to have added an adverse use requirement to its prerequisites for acquiring prescriptive avigation easements, failed to take into consideration that the District Court specifically included this element in its analysis, and specifically found that the County's use was adverse (App. infra, at A84-86). These errors deprived petitioner of its right to have its claims against Connecticut residents decided by an impartial federal tribunal, rather than to have such claims compromised by a

*In an attempt to justify its reliance on the Connecticut opinion, the Court below rationalized that while the Connecticut opinion refused to answer any of the questions of law certified to it, it had answered a "subset" of the

myopic and parochial state court decision.

The Connecticut Supreme Court's fact specific decision, coupled with its refusal to answer any of the certified questions of law, does not constitute a controlling statement of state law which must be applied by the Court of Appeals for the Second Circuit. Rather, it is a result oriented decision designed to defeat the County's claim while conveniently leaving the general question of law unanswered for a more sympathetic claimant.

The fact that the Connecticut Court

---

certified questions of law i.e. "whether an avigation easement can be acquired ... in these circumstances" (App. infra, at A20). The question the Connecticut court posed to itself, in lieu of those certified to it, was a question of fact, not law. It is axiomatic that a question of fact cannot be a "subset" of a question of law.

made no genuine effort to answer the questions of law certified to it while denying the County its easement as a matter of fact, is a striking example of why the need for diversity jurisdiction remains as strong today as it appeared to the drafters of the Constitution over two hundred years ago.

The mischief caused by allowing narrow state interests to decide Westchester County's claim against Connecticut residents goes far beyond economic harm to the County. It seriously affects national interests and impedes the right of the public to freedom of transit through the navigable airspace of the United States, 49 App. U.S.C. §1304, which includes airspace needed to land safely. 49 App. U.S.C. §1301(29). The FAA has expressed its concern in this area.

The Westchester County Airport is an integral part of the New York City Metropolitan Air Transportation System. Actions which reduce its effectiveness also diminish the effectiveness of the system as a whole. While state law normally prevails in the private aspects of diversity jurisdiction cases between private parties, Erie R. Co. v. Tompkins, op cit, supra p. 28, nevertheless, where there are broad issues going beyond the narrow interests of the parties, and where federal rights are implicated, the federal courts have applied federal common law. Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S. Ct. 573 (1943). The present case, unlike Miree v. DeKalb County, Ga., 433 U.S. 25, 97 S. Ct. 2490 (1977) strikes at the heart of the national transportation system by allowing a state court (which

has no jurisdiction to make findings of ultimate fact on a certified question of law referral) to determine the fate* of the national air transportation system in this area.

Petitioner is not suggesting at this point, that this Court impose a federal law of prescriptive avigation easements, but it does urge that this Court, at the very least, not disrupt the air transport system by tolerating the application of some purported state requirement, which the state court itself refused to enunciate, even though explicitly invited to do so.

This Court has granted certiorari before when important issues of federal-state relations were raised.

---

*Unless the obstructing trees are trimmed, their continued growth will ultimately lead to the closure of Runway 11/29, or to such drastic shortening as will render it useless.

Bank of America National Trust and Savings Association v. Parnell, 352 U.S. 29, 77 S. Ct. 119 (1956), and petitioner urges that it do so again, to vindicate petitioner's right to have its claims adjudicated by an impartial tribunal and to protect the national air transportation system from unwarranted state interference.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the Decision and Order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

MARILYN J. SLAATTEN
Westchester County Attorney
Counsel for Petitioner
600 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601
(914) 285-2673

Carol L. Van Scoyoc

CAROL L. VAN SCOYOC
Deputy County Attorney
Counsel of Record

MARGUERITE R. WIESS
Assistant County Attorney

March 30, 1994